

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAUDE LEROY TOMS

Claimant

VS.

DAN DEE AIR, INC.

Respondent

AND

UNITED FIRE & CASUALTY CO.

AND/OR

FEDERATED MUTUAL INS. CO.

Insurance Carriers

Docket No. **1,048,185**

ORDER

Claimant requests review of the August 10, 2010 Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant, who worked for respondent as a welder, alleges he sustained repetitive trauma injuries to his neck and left shoulder due to the work he performed for respondent from March 29, 2005, through October 19, 2009. In the August 10, 2010 Preliminary Hearing Order, the Administrative Law Judge (ALJ) denied claimant's request for workers compensation benefits after finding that claimant had failed to prove that he sustained an accidental injury arising out of and in the course of employment with respondent. The ALJ was persuaded by the opinions of Dr. Kris Lewonowski who believes claimant's present complaints are from a 2004 accident and the ensuing medical treatment, including the non-union of an attempted fusion in 2007. The doctor does not believe claimant's symptoms are caused by alleged repetitive traumas at work. Furthermore, Dr. Lewonowski believes the failed fusion may have been caused by claimant's smoking.

In this proceeding claimant alleges he sustained repetitive traumas to his neck and shoulder at work as he routinely violated a lifting restriction he was given after his 2007, or second, neck surgery. Claimant argues the ALJ erred (1) by finding that claimant did not tell either Dr. John Dickerson or Dr. Lewonowski his symptoms were related to work

and (2) by adopting Dr. Lewonowski's opinion that the non-union was probably caused by smoking when claimant allegedly quit smoking for a number of months following his 2007 neck surgery. In addition, claimant asserts the ALJ did not address the alleged injury to the left shoulder. In short, claimant alleges he injured his neck and left shoulder at work through October 19, 2009, and that he should be awarded both temporary total disability benefits and medical benefits for those injuries.

Two insurance carriers are presently involved in this claim. The first, United Fire and Casualty Company (United Fire), maintains that claimant has experienced the same complaints and symptoms since initially being injured in an accident on August 23, 2004, that was the subject of an earlier claim, Docket No. 1,024,244. United Fire maintains that as a result of that accident claimant underwent neck surgery in both 2004 and 2007, but his symptoms never resolved. United Fire argues the greater weight of the evidence indicates that claimant's present complaints emanate from his August 2004 accident rather than the injury alleged in this claim. Accordingly, respondent and United Fire ask the Board to deny claimant's request for benefits in this claim.

The second insurance carrier, Federated Mutual Insurance (Federated), argues the Preliminary Hearing Order should be affirmed as claimant's present complaints are due to a failed fusion in his neck, which Federated maintains is a personal condition or risk that is not compensable under the Workers Compensation Act. In the alternative, Federated asserts that under *Logsdon v. Boeing Co.*¹ claimant's complaints are a natural and probable consequence of his 2004 injury and, therefore, his alleged injury is not compensable in this claim. And, finally, Federated contends it is not responsible in this claim as the appropriate accident date for claimant's alleged repetitive trauma injuries is October 19, 2009, when claimant last worked for respondent and when United Fire was respondent's workers compensation insurance carrier. Federated argues claimant's injuries did not arise out of his employment, but if they did United Fire is the responsible insurance carrier.

The issue before the Board on this appeal is whether claimant sustained repetitive trauma injuries to his neck and left shoulder that arose out of and in the course of his employment from the work he performed for respondent during the period from March 29, 2005, through October 19, 2009.

The ALJ found claimant failed to sustain his burden of proof that his accidental injury arose out of and in the course of employment with respondent.

Claimant requests review of whether the ALJ erred in finding that claimant's accidental injury did not arise out of and in the course of employment with respondent.

¹ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Claimant argues he suffered a series of injuries to his neck and left shoulder between March 29, 2005, and his last day worked on October 19, 2009.

Respondent and United Fire argue that claimant's current problems are related to his original August 2004 injury with no aggravation or exacerbation and therefore, the ALJ's Preliminary Hearing Order should be affirmed.

Respondent and Federated argue that claimant's current condition is due to a personal risk and is not compensable. In the alternative, respondent and Federated argue that claimant's current complaints are a natural and probable consequence of his 2004 work-place injury and he is not entitled to compensation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

This is the third claim that claimant has pursued against respondent alleging injuries to his neck. These claims are interrelated as claimant underwent neck surgery in both 2004 and 2007. Accordingly, claimant's medical history and claims history are especially pertinent.

In one of the earlier claims, Docket No. 1,024,243, claimant alleged he injured his neck on August 23, 2004, when he struck his head on an I-beam. In the other earlier claim, Docket No. 1,024,244, claimant alleged he injured his neck due to repetitive traumas from and after August 23, 2004. Following a November 2005 preliminary hearing that addressed both claims, the ALJ denied claimant's requests for benefits. The ALJ reasoned:

Claimant's preliminary hearing requests are considered and denied. Claimant failed to give timely notice of an accident alleged to have occurred on or about August 23, 2004. Claimant attributes his injury and complaints to that event. Claimant, without prompting, never attributed his neck complaints to his work duties. On the contrary, he identified the only source for his injury as the event or incident of August 23, 2004. Claimant never attributed his injuries or physical complaints to his work duties in his discussions with his treating physicians, and there is no medical evidence on causation before the Court.²

Claimant did not appeal the November 17, 2005 Order and, according to the ALJ, has not presented additional evidence in either claim. The Division of Workers Compensation's database confirms that to be true. Neither Docket No. 1,024,243 nor Docket No. 1,024,244 are before the Board in this appeal.

² ALJ Order (Nov. 17, 2005).

Respondent is a metal fabrication company that regularly works at various salt mines. Claimant is an experienced welder whose job, on average, entailed welding 60 percent of the time and fabricating parts the remainder of the time at work. That work, which claimant performed for many years, could be strenuous and place claimant in awkward positions.

X-rays taken in late November 2004 indicated claimant had severe degenerative changes in his neck at C4-5 and C5-6. And a November 2004 MRI indicated claimant had degenerative changes at C4-5, C5-6, and C6-7, with a central disk protrusion at C5-6 and a left-sided protrusion at C6-7. Medical records from that period indicate claimant was smoking two packs of cigarettes daily.

In December 2004, Dr. Jacob Amrani operated on claimant's neck and performed an anterior discectomy and fusion with bone graft, plate and screws at C6-7. Claimant testified the surgery initially reduced his pain to one or two on a 10-point scale. The medical notes also indicate claimant's left upper extremity pain improved.

Upon recovering from that surgery, claimant returned to work for respondent in February 2005 with restrictions against lifting greater than 10 pounds and overhead work. After working for about a month, claimant alleges his neck and shoulder problems returned. Eventually his neck pain increased to nine or 10 on a 10-point scale. Claimant attributed his symptoms to lifting, welding, and snapping his neck in such manner as to lower his welding helmet. Claimant also noted that working in awkward positions bothered his neck and left shoulder.

In late June 2006, claimant was referred by his attorney to be evaluated by Dr. Paul Stein, a neurosurgeon. The doctor noted that claimant had neck pain going into both trapezius muscles, which increased with pulling and lifting, and pain in both arms extending into his neck. At that time claimant rated his pain at six to eight on a 10-point scale. He also advised that his pain would worsen the harder he worked. He told Dr. Stein he was smoking two packs daily.

Dr. Stein's June 2006 medical report indicates the doctor questioned whether the C6-7 fusion had adequately healed. Accordingly, the doctor recommended x-rays and, if necessary, a CT scan. In an August 2006 letter, the doctor opined that claimant's work was aggravating his symptoms. Dr. Stein wrote, in part:

There is one possible additional factor and that is whether or not the fusion has healed. If there is a nonunion, multiple factors may be involved, including his cigarette smoking, but also including stress on the bone graft from work activity. An x-ray of the cervical spine, possibly even a CT scan, would be necessary to determine whether or not the bone graft has healed. This would not specifically

alter the functional impairment rating but might require further treatment, including possible surgery.³

Due to increased neck and arm pain, claimant sought additional medical treatment with Dr. John Dickerson, a neurosurgeon. The doctor first saw claimant in mid-September 2007 and the next month performed surgery on claimant's neck. Dr. Dickerson found severe degenerative disc disease in claimant's neck and, according to the operative notes, performed anterior discectomy and fusion at C3-4, C4-5, and C5-6. There are indications in the doctor's records that he intended to address during surgery the C6-7 level, but that level is not mentioned in the operative report.

Claimant testified he returned to work for respondent in early December 2007 upon recovering from surgery and returned to his regular work duties with a 20-pound lifting restriction. According to claimant his pain was minimal at that time as it had decreased to either a one or a two on a 10-point scale.

Similar to the medical bills from his 2004 neck surgery, the record indicates claimant submitted the bills from his 2007 surgeries to his private health insurance carrier. But claimant's neck problems and shoulder pain are not the only maladies claimant has experienced during the period in question. Claimant represents that between his 2004 and 2007 neck surgeries he has experienced two heart attacks, a stroke and Bells Palsy; and that he now has high blood pressure, multiple sclerosis, and kidney problems.

Following the 2007 surgery, and after working for respondent two or three months, claimant's neck pain again increased prompting him to seek additional medical treatment. Claimant described a particular incident while welding a part referred to as a U-tube and immediately experiencing severe neck pain. He also said that snapping his welding hood off and on throughout the day hurt his neck.

Claimant, who is unable to read and write, reported the pain to his daughter, who took him to see Dr. Lewonowski. The doctor's records indicate he saw claimant in late August 2009 and that claimant told him about running into the I-beam several years before and about the 2004 and 2007 neck surgeries. Dr. Lewonowski's February 2010 letter to claimant's attorney indicated claimant's most recent MRIs revealed no rotator cuff tear but, perhaps, a SLAP tear; indicated claimant had arthritis in the acromioclavicular joint; white matter changes in his brain; most likely a non-union of the C5-6 fusion; and cervical stenosis that could explain the arm pain. In short, Dr. Lewonowski attributed claimant's present symptoms to a failed fusion, which the doctor believed was most always caused by smoking. It is not clear whether the doctor was fully aware of claimant's work activities and the manner that claimant lowered his welding hood with a snapping motion of his neck.

³ P.H. Trans., Cl. Ex. 1.

Dr. Lewonowski noted, however, that claimant was a heavy tobacco user as he had smoked a pack each day for the past 40 years.

Claimant testified he resorted to his private health insurance to pay Dr. Lewonowski's bill. When asked why he did not initially claim that medical expense as being work-related, claimant explained that respondent discourages workers compensation claims as the company fears it could lose business from the salt plants. Respondent refutes that assertion.

At his attorney's request, claimant was examined by Dr. George Fluter in early March 2010. After examining claimant and reviewing claimant's copious medical records, Dr. Fluter also concluded claimant had a possible non-union of a cervical fusion and a probable derangement in the left shoulder. The doctor recited a history that included claimant hitting his head on an I-beam, claimant falling and hitting his head on the ground after losing his balance pulling on a crate, and claimant having recurring pain after returning the work for respondent and violating his medical restrictions. The doctor concluded there was a direct relationship between claimant's current condition and his work. Dr. Fluter wrote, in part:

In my opinion, while failure to quit smoking may be a factor in the healing of the cervical spine following the surgery done by Dr. Dickerson in October, 2007, other factors play a role as well. Again, repetitive activities involving the head, neck and upper extremities would contribute to non-healing of the fusion surgery. Although I am unable to ascertain a specific date, [claimant] reported an episode where he fell backward and hit his head after pulling on the side of a crate at work.⁴

Claimant denies injuring his neck or shoulder away from work. Moreover, claimant testified his neck and shoulder symptoms have continued since 2005.

Q. (Mr. Biggs) Okay. Now, you've had – you've really had neck pain since Amrani did the surgery; correct?

A. (Claimant) Yes, sir.

Q. And you've continued to have that neck pain as we sit here today; correct?

A. Yes, sir.

Q. And it's the same thing you – since Dr. Dickerson's surgery you've had shoulder pain; correct?

A. Yes, sir.

⁴ P.H. Trans., Cl. Ex. 2.

Q. And you've continued to have that shoulder pain up until we sit here today; correct?

A. Yes, sir.

Q. And that shoulder pain has never gone away, has it?

A. No, sir.

Q. And that neck pain has never gone away?

A. No, sir.

Q. And it's been that way since the 2005 surgery?

A. Yes, sir.⁵

Claimant last worked for respondent on October 19, 2009. Both Drs. Lewonowski and Flutter believe that claimant is unable to work at this time and that claimant needs further evaluation. The doctors also apparently agree that the source of claimant's symptoms may be a failed cervical fusion. The doctors, however, disagree as to whether claimant's work activities through the end of his employment with respondent injured claimant's neck.

Echoing the earlier docketed claims, the ALJ concluded claimant should be denied workers compensation benefits as he had failed to prove his present condition and problems arose from an injury at work. Again, the ALJ found claimant had failed to adequately relate his symptoms to work as he sought medical treatment. The ALJ noted:

In 2006, when Claimant was referred by his counsel to Dr. Paul Stein, a neurosurgeon, Claimant did not suggest work activities were the cause of his continuing complaints, and Dr. Stein did not recommend additional work restrictions. Dr. Stein did express concern about Claimant's continued smoking and the stability of Dr. Amrani's fusion.

In 2007, when Claimant sought relief from continuing symptoms after the first surgery, he did not attribute those complaints to his work duties. He sought treatment on his own referral and the expenses of Dr. Dickerson's surgery were billed to Claimant's health insurer. Claimant continued to use tobacco, although the extent of his usage is in dispute. Claimant and his ex-wife cannot agree on the length of time following Dr. Dickerson's surgery that he stopped smoking, but they agree he resumed smoking and the use of chewing tobacco. Claimant did not report the 2006 complaints to Respondent as a work-related injury or condition.

⁵ P.H. Trans. at 55-56.

In 2009, when Claimant again sought treatment from Dr. Lewonowski, he did not attribute his complaints to his work duties. Instead, Dr. Lewonowski recorded a history of persistent complaints since the original injury five years before, and the surgery by Dr. Dickerson two years earlier. With Claimant's history of smoking four packs per day in 2009, and the history of persistent complaints since the original injury and surgery, Dr. Lewonowski concluded the complaints were attributable to the original injury and surgeries. Given the level of Claimant's tobacco use, and the history of persistent complaints, Dr. Lewonowski related the non-union of C5,6 to tobacco use.

While Dr. Fluter has a different opinion on causation, he was provided a vastly different history by Claimant than any of Claimant's treating physicians. Dr. Fluter also based his opinion on Claimant's representation that he hadn't used tobacco since around the time of the 2nd surgery, a fact contradicted by both Claimant and his ex-wife.⁶

The ALJ was persuaded by Dr. Lewonowski's opinions that claimant's symptoms were probably from a failed fusion that was likely caused by his smoking. In short, the ALJ denied claimant's current claim. The undersigned Board Member agrees.

Claimant testified that he quit smoking for three or four months following his second neck surgery (in October 2007) and then resumed when he began smoking half a pack or so daily and chewing tobacco. That is less than the smoking history recorded in 2009 by Dr. Lewonowski and claimant's admissions. Claimant's ex-wife described claimant's smoking habit as minimal as claimant never smoked much at all as he smoked less than one-half pack per day before his second surgery but now chews and only smokes about seven cigarettes per day.

The greater weight of the evidence indicates that claimant is a chronic smoker. Also, the greater weight of the evidence indicates that claimant has a failed fusion, which has been symptomatic for quite sometime, that is more likely than not that claimant's smoking caused the non-union. Furthermore, the testimonies from Jack Krehbiel and Richard Dauber, respondent's owners, indicate that claimant never complained to them that his work activities following the 2007 neck surgery were causing him neck problems. Indeed, the testimony from respondent's secretary, Kendis Brummer, indicates that claimant told her that his present symptoms and problems were due to his two neck surgeries that he said had been botched.

Considering the record compiled to date, the undersigned Board Member finds claimant has failed to prove his present symptoms and condition are related to an injury he sustained at work. Accordingly, the August 10, 2010 Preliminary Hearing Order should be affirmed.

⁶ ALJ Order (Aug. 10, 2010) at 5.

By statute, the above preliminary hearing findings are neither final nor binding as such findings may be modified upon a full hearing of the claim.⁷ Moreover, this review of a Preliminary Hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Bruce E. Moore dated August 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
James B. Biggs, Attorney for Respondent and United Fire & Casualty Co.
Dallas L. Rakestraw, Attorney for Respondent and Federated Mutual Ins. Co.
Bruce E. Moore, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2009 Supp. 44-555c(k).